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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Deployment of Wireline Services	)	CC Docket No. 98-147
Offering Advanced Telecommunications	)	
Capability		

TO: The Commission

COMMENTS OF UTC

Pursuant to Section 1.415 of the Commission's Rules, UTC[1] hereby submits its Comments in response to the Memorandum Opinion and Order, and Notice of Proposed Rulemaking, FCC 98-188, released August 7, 1998 (MO&O/NPRM), in the above-captioned proceeding.[2] As explained herein, UTC urges the FCC to leverage any regulatory flexibility accorded to incumbent local exchange carriers (LECs) to deploy advanced telecommunications services in a manner that will also promote competitive service deployment by other entities.

I. Introduction

UTC is a not-for-profit association representing the telecommunications interests of approximately 1,000 electric, gas and water utilities and natural gas pipelines (collectively referred to herein as "utilities"). UTC's member companies range in size from multistate utilities serving millions of consumers, to small rural electric cooperatives and municipal utilities serving only a few thousand consumers each. All utilities rely on

[1] UTC, The Telecommunications Association, was formerly known as the Utilities Telecommunications Council.

information and telecommunications services to carry out their underlying public service obligations, with each utility generally employing a mix of services provided by "public" telecommunications service providers as well as the utility's own privately-owned and -operated communications networks. Because of their dual role as both large consumers of telecommunications services, and as actual and potential providers of telecommunications and related services, UTC is pleased to have the opportunity to comment on the NPRM.

II. The FCC Should Limit Use of The Separate Affiliate Mechanism to States in Which Barriers to Entry Have Been Fully Eliminated

As explained in UTC's Comments on the related Notice of Inquiry in CC Docket No. 98-146, FCC 98-187, released August 7, 1998, UTC has consistently supported the position that the telecommunications market should be open to competition, and that regulatory barriers to entry should be eliminated wherever possible. However, a number of regulatory barriers remain even as the Commission undertakes in the present proceeding to find ways to encourage incumbent LECs to provide advanced telecommunications services. UTC believes that the Commission can design a regulatory structure that will not only permit incumbent LECs to deploy advanced telecommunications services, but that will also promote competitive services by other service providers.

UTC agrees with the FCC that one of the fundamental goals of the Telecommunications Act of 1996 is to "promote innovation and investment by all

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[2] By Public Notice, released August 12, 1998, the Comment date was changed to September 25, 1998.

participants in the telecommunications marketplace, both incumbents and new entrants."[3] UTC further agrees that the Commission's role is not to "pick winners or losers, or select the 'best' technology to meet consumer demand, but rather to ensure that the marketplace is conducive to investment, innovation, and meeting the needs of consumers."[4] Thus, the Commission should ensure that regulation promotes competitive entry by any potential service provider, and that incumbent LECs are not placed in a more favorable position through regulation. In short, regulation should be measured against the fundamental principles of "nondiscrimination" and "parity."

Through the NPRM, the Commission has proposed a mechanism whereby a separate affiliate of an incumbent LEC, which affiliate meets specific structural separation and nondiscrimination requirements, would not be considered an incumbent LEC for purposes of the requirements of Section 251(c), and would therefore not be subject to the unbundling and resale obligations. The Commission has requested comment on any specific modifications to this framework, and how incumbent LECs "could improperly discriminate against competing providers, for instance, by using control over key facilities and services, in order to gain competitive advantage for their advanced services affiliates."[5]

Without addressing, at this time, the specific structural separation requirements proposed by the Commission, UTC recommends one significant modification that would

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[3] NPRM, para 1.
[4] Id., para. 2.
[5] Id., para 97.

help to ensure competitive neutrality, promote additional competitive service offerings, and impose only minimal, if any additional burdens, on the incumbent LEC or its affiliate. In order to promote a "level playing field" for advanced telecommunications services, and to ensure that incumbent LECs do not use their considerable influence before state legislatures and regulatory bodies in an effort to unreasonably forestall competition, UTC recommends that the specific mechanism proposed by the FCC be available only in a state in which the incumbent LEC is able to demonstrate to the FCC that any other entity in that state would be permitted to offer the same or similar services as the incumbent LEC's advanced telecommunications affiliate, and that, to the extent any other entity in the state would be prohibited or restricted in any manner from providing the same or similar services, the incumbent LEC and its affiliate would be subject to the same prohibitions or regulations.

Pursuant to Section 253(a), "[n]o State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service." Under Section 253(d), the Commission is required to preempt any law or regulation that violates subsection (a). In practice, however, proceedings to preempt state or local laws under Section 253 are time-consuming, and in fact frustrate congressional intent by delaying the elimination of barriers and the introduction of competition. Many state legislatures and regulatory commissions have undertaken their own statutory and regulatory reviews to eliminate barriers to entry in compliance with the Act, but there are two principal areas in which barriers to entry remain: (1) state regulation of the transactions between a regulated

utility and its telecommunications affiliate or subsidiary, and (2) state statutes that prohibit direct or indirect provision of telecommunications services or facilities by municipally-owned utilities.

As noted in UTC's Comments in CC Docket No. 98-146, utilities find themselves in the unique position of straddling two regulated industries, both of which are typically regulated by the same state agency. While the states have generally relaxed the conditions for entry by new competitive local exchange carriers, there seems to be a reluctance to let go of the more stringent regulations as applied to utility entry into telecommunications. Imposition of stringent conditions on affiliate transactions might have relevance in the context of a regulated entity entering a closely-allied non-regulated business (*e.g.*, an incumbent LEC forming an advanced telecommunications service subsidiary), but they offer little practical benefit to consumers where the businesses are as distinct as energy and telecommunications, and where there is a strong overriding national policy in favor of open entry into telecommunications.

With respect to barriers to municipal utility entry into telecommunications, the incumbent LECs themselves have been the leading proponents of these restrictions, even as they argue before their state commissions and the FCC that their markets are fully open to competition. In its first decision on preemption of such barriers to municipal entry,[6] the Commission adopted a constrained reading of Section 253 that has sent a signal to incumbent LECs that they can effectively forestall competition by lobbying for the passage

of state laws that will prohibit the direct or indirect participation of municipalities and municipal utilities in telecommunications. For example, restrictions similar to those at issue in the Texas case have been adopted in Missouri and are currently the subject of a preemption petition.[7] Ironically, the FCC is proposing mechanisms in this docket by which incumbent LECs could create separate "entities" that would not be subject to the same regulatory treatment as incumbent LECs, while the FCC effectively concluded, the so-called "Texas" decision, that a municipal corporation could not, under any circumstances, be considered a separate entity from its "parent," the state legislature.

If the Commission were to adopt UTC's recommended condition on incumbent LEC provision of advanced telecommunications services, the FCC would be able to discourage enactment of restrictive state legislation or additional barriers to entry, and it would thereby minimize the need to entertain and act upon preemption petitions. Such a condition would also help to discourage incumbent LEC from supporting such restrictive state law.

III. Conclusion

If the Commission adopts rules that would permit separate affiliates of an incumbent LEC to provide advanced telecommunications services as proposed in the NPRM, the Commission should impose a further condition that would limit this mechanism to states in which the incumbent LEC is able to demonstrate to the FCC that

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[6] In the Matter of The Public Utility Commission of Texas, FCC 97-346, released October 1, 1997, appeal pending *sub nom.* City of Abilene v. FCC, Nos. 97-1633 *et al.* (D.C. Cir).

any other entity in that state would be permitted to offer the same or similar services as the incumbent LEC's advanced telecommunications affiliate, and that, to the extent any other entity in the state would be prohibited or restricted in any manner from providing the same or similar services, the incumbent LEC and its affiliate would be subject to the same prohibitions or regulations.

WHEREFORE, THE PREMISES CONSIDERED, UTC respectfully requests the Federal Communications Commission to take action in this docket consistent with the views expressed herein.

Respectfully submitted,

UTC

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[7] Not coincidentally, the largest incumbent local exchange carrier in both Texas and Missouri is Southwestern Bell. See Petition of Missouri Municipal League, CC Docket No. 98-122.